In the Supreme Court of the United States.

October TERM, 1897.

HIGHLAND AVENUE & BELT RAILROAD COMPANY,
Appellant,
vs.
COLUMBIAN EQUIPMENT COMPANY,
Appellee.
No. 427.

Certificate from the Circuit Court of Appeals for the Fifth Circuit.

BRIEF AND ARGUMENT OF ALEXANDER T. LONDON FOR APPELLANT.

Statement of Facts.

On June 1, 1896, the Columbian Equipment Company, a West Virginia corporation, filed its bill against the Highland Avenue & Belt Railroad Company, an Alabama Corporation, and therein alleged that on or before the 31st day

of December, 1894, the defendant was engaged in operating a belt railroad and dummy line in and through the city of Birmingham, Alabama, in the county of Jefferson, and on said date entered into an agreement in writing with the complainant for the sale of all of the properties, which agreement is in the words and figures as follows, to-wit:

"STATE OF ALABAMA,
JEFFERSON COUNTY.

An agreement entered into this, the 31st day of December, 1894, by and between the Highland Avenue & Belt Railroad Company, a corporation created and organized under the laws of Alabama, hereinafter termed the Railroad Company, party of the first part, and the Columbian Equipment Company, a corporation created and organized under the laws of West Virginia, hereinafter designated the Equipment Company, party of the second part;

Whereas, the parties of the first part have entered into a preliminary agreement in respect to the matters herein provided and contracted for as appears by the records and proceedings of the said two corporations;

And whereas, by a resolution of the Board of Directors held on the 30th day of November, 1894, the terms of this contract were agreed upon and Henry M. Caldwell was authorized on behalf of the Railroad Company to execute the same;

And whereas, the said parties hereto are each respectively expressly authorized by their respective charters to enter into this contract. Now this agreement witnesseth:

1. The Railroad Company does hereby lease and let to the Equipment Company all of its railroad, with all of the rolling stock, engines, tools, machines, equipments, supplies

and materials of all kinds now used or to be used in connection therewith, and also all real estate, personal property, franchises, rights of way and privileges for the period of eighteen (18) calender months from the first day of December, 1894, at and for the rental of five ($5) dollars per annum, and the proportionate part of said sum for any less time than one year, the said rental to be payable on the termination of said lease.

2. The Railroad Company covenants and agrees that it will procure at its own cost and expense for the benefit of said Equipment Company, within two (2) months from the first day of December, 1894, the right of way neccessary for a railroad track to connect the line of the Birmingham and Gate City Street Railroad with the track of the Highland Avenue & Belt Railroad at or near the gin factory on Tenth avenue.

3. Said Railroad Company further agrees that said Equipment Company shall have the right and option at any time during the continuance of said lease, to purchase all the said railroad, real estate, property, franchises, privileges and rights of way of said Railroad Company for the sum of three hundred and fifty thousand ($350,000) dollars upon the following conditions and terms: For said option and privilege the said Equipment Company shall pay to the said Railroad Company the sum of thirty-five thousand ($35,000) dollars, as follows: Twenty thousand ($20,000) dollars on or before the 1st of January, 1895, at which time the Railroad Company will deliver the possession of all of said railroad, real ertate, property, franchises, privileges and rights of way to said Equipment Comprny, and Fifteen Thousand ($15,000) Dollars on or before the fifteenth day of February, 1895.

In the event of a failure to pay said Fifteen Thousand ($15,000) Dollars by the fifteenth day of February, 1895, said privilege and option shall on that day cease and determine, and the Twenty Thousand ($20,000.00) Dollars previously paid shall be thereby forfeited and the possession of the property shall be forthwith restored to the Railroad Company. In case the said Equipment Company shall exercise its right and option to make said purchase within the time above specified to-wit: During the continuance of this lease, said sum of thirty five thousand ($35,000.00) dollars so paid as aforesaid shall be considered and treated as a part of the purchase price and the residue to be paid with interest at the rate of five (5) per centum per annum, from the 1st day of January, 1895, to the time of payment.

4. The said Railroad Company hereby agrees to have prepared and duly executed to said Equipment Company within thirty (30) days after the payment of said sum of Fifteen Thousand ($15,000.00) Dollars, as herein provided, good and sufficient deed or deeds of conveyance and transfer of all of said railroad, real estate, property, franchises and right of way and to deposit said deed or deeds and transfers with the Central Trust Company of the City of New York in escrow to be deliverd to said Equipment Company whenever within the period of said option to wit: On or before the 1st day of June, 1896, said sum of three hundred and fifteen ($315,000.00) dollars with the interest thereon at five per centum per annum from the 1st of January, 1895, shall have been deposited in said Central Trust Company to the credit and subject to the check of the Railroad Company, less any amounts which the Equipment Company may, in the meantime, have seen fit to pay or to advance to said Railroad

Company. Said Railroad Company further covenants and agrees that it will make said conveyance and transfer of said railroad, real estate, property, franchises and right of way, free and unencumbered of all liability, and will pay off and discharge all liens, taxes or judgments which now exists or which may hereafter be obtained upon the liabilities of the railroad existing on the first day of December, 1894.

5. Said Railroad Company agrees that it will apply a portion of said thirty-five thousand ($35,000.00) dollars to the satisfaction in part of the judgments now existing as a lien on said property. It further agrees that it will protect the said Equipment Company in the operation of said property from the judgments already recovered against it or which may hereafter be recovered on liabilities existing as aforesaid, so that the same shall not interfere with the operation of said property by the said Equipment Company.

6. In the event the said Equipment Company fails within the period of said option and privilege, to-wit: On or before the first day of June, 1896, to pay said sum of three hundred and fifteen thousand ($315,000.00) dollars, with interest, as aforesaid, less such sum to which it may be entitled as credits thereon, if any, said option and privilege to purchase shall thereupon and thereby, and without further notice, absolutely cease and determine, and the said Equipment Company will restore to said Railroad Company the possession of the said railroad, real estate, property, franchises and right of way, free and discharged of any lien, interest, claim or demand done or suffered by said Equipment Company, except the taxes for the year 1895; and the said Central Trust Company shall in that event, return to the said Railroad Company the deeds, conveyances, transfers and

agreements which may be deposited in escrow with it without the payment of any commission or other charge whatsoever upon the same.

7. Said Equipment Company covenants and agrees on its part that it will pay said sum of thirty five thousand ($35,000.00) dollars as herein provided. That during the term of said lease, and within six (6) months from the first day of January, 1895, it will make or cause to be made improvements and betterments on the property and equipments of said Railroad Company, at an expenditure of not less than ten thousand ($10,000.00) dollars. The said Equipment Company also agrees that it will pay the taxes on said property for the current year, and the amount so paid for taxes, with interest at five (5) per centum per annum, shall be regarded and treated as a credit on said sum of three hundred and fifteen thousand ($315,000.00) dollars, to be paid in the event it shall exercise the option herein provided; and the said Equipment Company further agrees that it will advance and pay such additional sum as may be necessary to pay said judgments recovered and to be recovered as aforesaid, in the event the said Railroad Company cannot postpone the payment of the same until after the time when the said Equipment Company shall exercise its said option; said agreement being subject to the agreement on the part of the Railroad Company to protect the said Equipment Company against interference in the operation of said property, by said judgments.

In witness whereof the Highland Avenue and Belt Railroad Company authorizes this contract to be executed by Henry M. Caldwell, one of its directors, and its corporate

seal to be hereto attached this, the day and date first above written.

Executed in duplicate.

HIGHLAND AVENUE & BELT RAILROAD COMPANY.

Per H. M. CALDWELL, Director, with full power to act.

[SEAL.]

The Columbian Equipment Company hereby accepts the foregoing lease and contract, and in witness thereof has caused the same to be executed by its President and Secretary, and its corporate seal to be hereto affixed, in duplicate, the day and date as aforesaid.

THE COLUMBIAN EQUIPMENT COMPANY,

WAYLAND TRASK, President.

CLARENCE E. STUMP, Secretary.

[SEAL.]

The bill then proceeds among other things to allege that the complainant took possession of the belt railroad and dummy line and other properties of the defendant, holding and operating them continuously until the present time; that the complainant under the aforesaid agreement has paid the sum of $35,000 in cash and in addition thereto has expended on improvements and betterments a large sum, to the amount of $27,108.56, and that the defendant did not until the first week in May, 1896, deposit with the Central Trust Company of the City of New York an instrument in writing, in escrow, purporting to be a deed of conveyance and transfer, a copy of which instrument is attached and made part of the bill. The bill then sets out that prior to the execution of the agreement, various and sundry specific representations were made

by the defendant to the complainant as to the extent and title of the property of the defendant, and then charges that to several parts of the property, right of way, etc., the defendant had no title, or not full title—all this being charged at length and in detail, but not necessary for the purposes of this case to recite. It is to be noticed, however, that the bill nowhere charges that the complainant acted upon or was deceived by any of the representations of the defendants, nor that the complainant accepted or availed itself of its option to purchase the properties of the Belt Railroad within the time prescribed in the agreement or since. The bill charges the insolvency of the Highland Belt Railroad Company, the necessity of keeping the property as a whole, to preserve the same and to ward off execution, etc. The bill prays for a decree adjudging that the contract be rescinded, canceled, declared of no effect, null and void; that an equitable lien be declared upon all the property of the defendant in favor of the complainant for the amounts expended by complainant under and in pursuance of the agreement, and for such damages as may seem just and proper; that all the properties of the defendant be sold to satisfy complainant's demand, the proceeds to be applied to the payment of costs and expenses and demands of such person or parties as may by decree of the court be entitled to priority over the payment of orator's claim; for the marshalling and distribution of assets; for the appointment of a receiver, and for an injunction.

On June 1, 1896, there was also filed a petition for the appointment of a receiver, and on that day the Circuit Court, presided over by Honorable John Bruce, District Judge, entered an order appointing H. L. Underwood receiver as prayed for, and issuing an injunction against the Highland

Avenue and Belt Railroad Company, and its officers, directors and agents, and employes, forbidding them from in any way interfering with the possession or management of the receiver. On June 5th an answer was filed to the bill. On June 13, 1896, on proper authority, the bill was amended, and on the 13th of June an answer was filed to the amended bill. A motion having been made to dissolve the injunction and to discharge the receiver, at the instance of Honorable John Bruce, District Judge, it was fixed for hearing before the Honorable D. A. Pardee, Circuit Judge, and after due hearing, the said motion was granted and a decree was accordingly entered discharging the receiver and dissolving the injunction. Subsequently, on June 6, 1897, the Honorable John Bruce, District Judge, sitting as Circuit Judge, granted leave to amend the bill and an amended bill was thereafter duly filed. On the 6th of March, 1897, the following petition for the appointment of a receiver was filed by the complainant.

Record p. 19.

Petition of Complainant for Receiver.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

Columbian Equipment Company vs. Highland Avenue & Belt Railroad Company—In Equity No. 82.

Your petitioner, the Columbian Equipment Company, respectfully makes this its application and shows unto your Honor:

1. That on the first day of June, 1896, it filed its bill of complaint against the defendant herein, wherein it prayed

for an injunction and the appointment of a Receiver of all the Highland Avenue & Belt Railroad Company's property, which said bill your petitioner adopts as a part of this petition and begs leave to refer to the same whenever it may so desire.

2. That on the first day of June, 1896, Henry L. Underwood, a resident citizen of Birmingham, Ala., was by the Hon. John Bruce, Judge, etc., appointed Receiver of defendant's property, but subsequently upon a motion filed by the defendant to vacate the order appointing a Receiver (which said motion at the request of the Hon. John Bruce was heard by the Honorable Don A. Pardee at New Orleans, La.), the order appointing said Underwood Receiver of the properties of the defendant and the injunction in connection therewith was set aside and avoided.

Your petitioner represents and shows unto your Honor that according to the terms of said decree of the Hon. Don A. Pardee vacating said order appointing said Receiver, etc., a copy of which decree is hereto attached marked Exhibit A, the said Receiver was required to turn over and deliver to the parties or party from whose possession he took the same all the property of every kind and description of the Highland Avenue & Belt Railroad Company which came into his hands as such Receiver; that said Underwood received the properties of the defendant from your petitioner and in pursuance of said decree turned over and delivered the same into the possession of your petitioner.

Your petitioner further states that after said Receiver had delivered into its possession said properties the said Highland Avenue & Belt Railroad Company, without due process of law, wrongfully took possession of said properties

at that time under the control of your petitioner without your petitioner's consent and over its protest.

Your petitioner now charges and states that in contemplation of law the possession of said properties rest still in your petitioner; that at the time of the filing of said bill of complaint said properties were in its possession as stated in said bill, and that your petitioner is now, according to said decree and under the law, entitled to the possession of the same.

3. Your petitioner further shows unto your Honor that on the 5th day of March, 1897, it filed in said cause an amendment to said original bill, which said amendment your petitioner adopts as a part of this petition and begs leave to refer to the same whenever it may so desire.

4. Your petitioner further states unto your Honor that the defendant is heavily involved in debt; that it is not able to pay the judgments that are of record against it, as more fully stated in said bill of complaint, amounting, to-wit: to sixty-odd thousand dollars; that it is not able to pay its current expenses and fixed charges as set forth in said amendment to said bill, filed March 5, 1897, and your petitioner charges and states it to be a fact that the defendant is insolvent.

5. That your petitioner has been notified that the judgment creditors of the defendant will make application for the appointment of a Receiver of its properties for the purpose of having the same sold for the satisfaction of their demands.

6. That your petitioner is advised by counsel, and therefore states, that on the facts alleged in said bill of complaint and its amendment of March 5, 1897, it is entitled under the law to retain possession of the properties of the

defendant until its demand is satisfied by the defendant, or until the same is satisfied from the proceeds of a sale to be declared and ordered by some court having jurisdiction of such matters in your petitioner's favor and such other creditors as may see fit to join in said bill.

But your petitioner states that under the circumstances of this case it prefers to have an officer of your Honor's Court to become the custodian of defendant's properties until the legality of your petitioner's demand is established by decree of this Honorable Court, and so that said properties may be conserved pending the enforcement of the rights and equities of your petitioner and other creditors of said defendant, as well as protecting the rights, interests and properties of the defendant and to secure as far as possible the performance of the duties which said defendant owes to the public as a common carrier, as well as to preserve the unity of the business and property of said defendant as the same has been maintained and operated since its organization and of preventing disruption thereof by separate executions, attachments or sequestrations.

7. That to serve such ends as stated in the sixth paragraph of this petition the necessity exists for the appointment of a Receiver forthwith to preserve the value of said property and to collect rents and profits that may accrue from the operation of said properties and railroads for application on your petitioner's debt and the other debts of the company; and that unless a Receiver is appointed of the defendant's property the value thereof will become impaired and said indebtedness thereby rendered of uncertain or impossible collection.

Wherefore your petitioner prays that a Receiver may be

appointed forthwith to take charge of such properties under a decree of your Honor's Court.

Your petitioner suggests as in every way a competent and suitable person to be appointed such receiver Phillip Campbell, formerly the General Manager of the Birmingham, Sheffield and Tennessee Valley Railroad, lately the General Manager of said railroad under the Receiver thereof, Edmund A. Hopkins, heretofore appointed under an order of this Honorable Court, and now a resident of this district and a citizen residing at Sheffield, Ala.

HENRY D. HOTCHKISS and
JOHN F. MARTIN,
Solicitors for Complainant.

Record p. 21.

And on this petition and the bill and amendments, and on motion thereto of the complainant the following order was entered appointing Phillip Campbell as receiver:

Order Appointing Receiver Phillip Campbell.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

Columbian Equipment Company vs. Highland Avenue & Belt Railroad Company, et al.—In Equity.

Upon reading and considering the verified bill in this cause, together with the amendment thereto and the petition of the Columbian Equipment Company, filed on the 6th day of March, 1897, at this term of the Court, for the appointment of a receiver, on the motion of counsel for said petitioner, it is ordered by the Court that the prayer of the petition be

granted and that Phillip Campbell, a citizen of Sheffield, Alabama, be and is hereby appointed receiver of this Court of all and singular the property, assets, rights and franchises of the Highland Avenue & Belt Railroad Company, doing business in the city of Birmingham, Alabama, described in the bill of complaint herein, wherever situated, and including all railway tracks, terminal facilities, real estate, warehouses, offices, stations and all other buildings and property of every kind owned, held, possessed or controlled by the said Company, together with all property in connection therewith, and all monies, choses in action, credits, bonds, stocks, leasehold interests, operating contracts, and other assets of every kind and all other property, real, personal and mixed, held or possessed by it, to have and to hold the same as the officer of and under the orders and direction of the Court.

The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found, and to continue systematically, in the same manner as at present, the business and occupation of carrying passengers and freight and the discharge of all the duties obligatory upon the said company.

And the said Highland Avenue & Belt Railroad Company and each and every of its officers, directors, agents and employes are hereby required and commanded forthwith to turn over and deliver to such receiver, or his duly constituted representative, any and all notes, accounts, money or other property in his or their hands, or under his or their control.

Said receiver is hereby fully authorized to continue the business and operate the railway of said Company and manage all its property at his discretion in such manner as will, in his judgment produce the most satisfactory results con-

sistent with the discharge of the public duties imposed on said Company, and to collect and receive all income therefrom and all debts due said Company of every kind, and for such purpose he is hereby invested with full power at his discretion to employ and discharge and fix the compensation of all such officers, counsel, managers, agents and employes as may be required for the proper discharge of the duties of his trust.

Said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment to the proper protection of the property and trusts vested in him and likewise defend all actions instituted against him as receiver, and also to appear in and conduct the prosecution or defense of any and all suits or proceedings now pending in any Court against said Company, the prosecution or defense of which will, in the judgment of said receiver, be necessary and proper for the protection of the property and rights placed in his charge, and for the interests of the creditors and stockholders of said Company.

Said receiver is hereby required to give bond in the sum of $10,000, with personal security, or the security of some responsible Guaranty and Indemnity Company, satisfactory to the Clerk of this Court, for the faithful discharge of his duties, and is also required to make and file full reports in this Court quarterly.

And the Court reserves the right by orders hereinafter to be made, to direct and control the payments of all supplies, materials and other claims, and in all respects to regulate and control the conduct of said Receiver.

JOHN BRUCE, Judge.

April 5, 1897.

Endorsed—Filed in open Court this April 5, 1897.

N. W. TRIMBLE, Clerk.

Record p. 23.

From this order appointing the Receiver the defendant took an appeal, which was allowed, as shown by the petition and accompanying order:

Petition for Appeal.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

Columbian Equipment Company, Complainant, vs. Highland Avenue and Belt Railroad Company, Defendant.—In Equity. No. 82.

To the Honorable, the Judges of the Circuit Court of the United States for the Southern Division of the Northern District of Alabama:

The petition of the Highland Avenue & Belt Railroad Company, a body corporate under the laws of the State of Alabama, the defendant in the above entitled cause, respectfully shows unto your Honors that it is advised by counsel, and believes and therefore states that by the decree rendered by this Honorable Court on the 5th day of April, 1897, there is manifest error to the prejudice of your petitioner, for the correction of which your petitioner desires to appeal to the Circuit Court of Appeals for the Fifth Judicial Circuit of the United States, and your petitioner files herewith the assignments of error on said appeal.

Wherefore, and in consideration of the premises, your petitioner prays that it may be allowed to appeal from said decree rendered by this Honorable Court on the 5th day of April, 1897, to the said Court of Appeals.

And your petitioner further prays that the amount of its appeal bond may be fixed by your Honors.

And as in duty bound, your petitioner will ever pray.

ALEX T. LONDON, Solicitor for Petitioner.

Endorsed—Filed April 12th, A. D. 1897.

N. W. TRIMBLE, Clerk.

Record p. 23.

Order Allowing Appeal.

Columbian Equipment Company, Complainant, vs. Highland Avenue and Belt Railroad Company, Defendant.—In Equity. No. 82.

The Highland Avenue and Belt Railroad Company, the defendant in the above entitled cause, having this day presented and filed in open Court, its petition praying an appeal to the Circuit Court of Appeals for the Fifth Judicial Circuit, from the decree rendered on the 5th day of April, 1897, together with an assignment of the errors relied on on such appeal, as required by law, and praying that the amount of the bond for said appeal may be fixed.

It is therefore ordered, adjudged and decreed that the said petition be granted, and the said appeal be allowed as prayed in said petition. It is further ordered and decreed that the amount of the bond for such appeal without a supersedeas be, and the same is hereby fixed at the sum of five hundred dollars.

April 12, 1897. ALECK BOARMAN, Judge.

Endorsed—Filed April 12, A. D., 1897.

N W. TRIMBLE, Clerk.

Record p. 24.

On the appeal thus taken the assignments of error were as follows:

Assignment of Errors.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

Columbian Equipment Company, Complainant, vs. Highland Avenue and Belt Railroad Company, et al., Defendant. —In Equity. No. 82.

Now comes the Highland Avenue and Belt Railroad Company, the defendant in the above entitled cause, and files herewith its petition for an appeal from the decree rendered by the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, in the above stated cause, on the 5th day of April, 1897, and says that in the record and proceedings in the said cause there is manifest error in this, to-wit:

1. That the Court erred in holding that it had jurisdiction to grant the injunction as prayed.

2. The Court erred in entertaining jurisdiction of a suit in equity to subject property of the defendant corporation, in advance of the recovery of judgment at law, to the payment of a simple contract, when said debt is not secured by a lien or mortgage, because under the constitution the defendant company is entitled to a trial by jury.

3. The Court erred in granting an injunction to a simple contract creditor, without a lien or mortgage, and thereby, prior to judgment, interfering with the possession of the property of this defendant, and requiring this defendant to surrender possession of its property to the Receiver named.

4. The Court erred in granting the mandatory injunction requiring the defendant corporation to deliver all of its property and assets to the receiver named.

5. The Court erred in granting the decree which in effect restrains this defendant, its officers and agents, from in any wise interfering with or controlling its property.

6. The Court erred in granting said injunction on the facts presented on the hearing.

ALEX T. LONDON, Solicitor for Appellant.

Endorsed—Filed April 12, 1897.

N. W. TRIMBLE, Clerk.

Record p. 25.

A motion was made in the Court of Appeals to dismiss the appeal for the want of jurisdiction, because the order appealed from did not grant an injunction, and was not equivalent to an order granting an injunction, and that the decree appealed from being interlocutory, and not final, was not susceptible of being appealed from.

The Circuit Court of Appeals, desiring the instruction of this Court, has of its own motion certified to this Court the following question:

"Was the decree appointing Campbell Receiver above referred to, susceptible of being appealed from on the ground that the said order embraced within its terms an injunction, or the necessary equivalent of an injunction?"

Record p. 25.

ARGUMENT.

An answer to the question certified involves the proper construction of Section 7 of the Act of Congress approved March 3d, 1891, as amended by the act approved February

18th, 1895. The amendments not affecting the statute, so far as this case is concerned, I omit the original statute.

Section 7 of the original act, as amended, is as follows:

"That where, upon a hearing in equity in a District Court or a Circuit Court, an injunction shall be granted, continued, refused or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving or refusing to dissolve an injunction, to the Circuit Court of Appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the Appellate Court; and the proceedings in other respects in the Court below shall not be stayed, unless otherwise ordered by that Court during the pendency of such appeal; and provided further, That the Court below may in its discretion require as a condition of the appeal an additional injunction bond."

I.

Acts Extending the Right of Appeal Should be Liberally Construed.

Statutes giving the right of appeal are liberally construed in furtherance of justice; such an interpretation as will work a forfeiture of that right is not favored. * * * An act intended to extend the right of appeal is remedial and should receive a liberal construction.

Southerland Stat. Constr., Sec. 440, citing Converse vs. Burrows, 2 Minn., 229.

Vigo's case, 21 Wall., 648.

In *Lyde vs. Bernard*, 1 M. & W. 113, Parke, B. said: "I admit that words may be construed in a sense different from their ordinary one, when the context requires it, or when the act is intended to remedy some existing mischief, and such a construction is required to render the remedy effectual. For we must always construe an act so as to suppress the mischief and advance the remedy."

In *Heydenfeldt vs. Daney Gold Min. Co.*, 93 U. S., 634, 638, this Court in an opinion by Mr. Justice Miller, says:

"'It is better always,' says Judge Sharswood, 'to adhere to a plain, common sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction. Gyger's Estate, 65 Penn. St., 312. If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act, taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment.'"

In *Smith vs. Townsend*, 148 U. S., 490, 494, the cardinal rules for the construction of statutes are thus declared:

"It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy. Thus in Heydon's case, 3 Rep. 7 b., it is stated that it was resolved by the Barons of the Exchequer as follows: 'For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging, of the common law, four things are to be dis-

cerned and considered: 1. What was the common law before the making of the act? 2. What was the mischief and defect for which the common law does not provide? 3. What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth. 4. The true reason of the remedy.'

"And by this Court, in United States vs. Union Pacific Railroad, 91 U. S., 72, 79, it was said that 'Courts, in construing a statute, may, with propriety, recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it. Aldridge vs. Williams, 3 How., 24; Preston vs. Browder, 1 Wheat., 120.'"

II.

The Statute has been Uniformly held Remedial, and the Greatest Liberality has been Shown in its Construction to Advance the Remedy.

I will discuss briefly all the decisions which I have been able to find, bearing on the question:

Dudley E. Jones Co. vs. Munger, etc. Mfg. Co. (Dec. 7, 1891), 49 Fed. 61, I. C. C. A., 158, in the Circuit Court of Appeals for the Fifth Circuit, is the earliest case construing Section 7. This was a Bill filed to enjoin the infringement of a patent; an injunction was granted and a reference ordered to state an account; the appeal was from the decree granting the injunction, and the Court of Appeals considered the case on its merits, reversed the decree below, and directed the bill to be dismissed.

On an application for a rehearing, 50 Fed. 785, I. C. C.

A., 668 (May 30, 1892), on the ground that the Appellate Court was without jurisdiction, Pardee, Judge, delivers the opinion of the Court, and, construing this section, uses the following language, p. 786: "An allowance of an appeal from an interlocutory order or decree, granting or continuing an injunction in an equity cause under the seventh section of the Judiciary Act of 1891, is a new feature of the practice in the United States Courts. Being of a highly remedial nature, it ought to be construed so as to give full force to the intention of the law maker. *The mischief to be remedied by the act was that injunctions which deprived parties of the possession and control of property, or compelled enforced action in the use of the property, were, under the practice of the Courts, frequently rendered long before the final hearing in the case, and operated to a great extent, in the nature of execution before judgment.* This mischief was as great in patent cases, where parties on hearing preliminary to the final decree, were enjoined, pending long and tedious examinations in the matter solely of accounting, as in any other cases of preliminary injunctions." The italics are mine.

Richmond vs. Atwood (Sept. 27, 1892), which, as Judge Pardee says, is on all fours with the case then before the Court, was also a patent case, in which a decree for an interlocutory injunction had been granted, and the appeal was from that decree.

The appeal was heard and the decree reversed by the Circuit Court of Appeals for the First Circuit, the question of jurisdiction not being presented.

48 Fed., 910, I. C. C. A., 144.

As in the case of the *Dudley Company vs. The Munger Company*, supra, there was an application for a rehearing,

and the question of the jurisdiction of the court was elaborately discussed.

Pending the application for a rehearing in this last case, the rehearing in *Dudley E. Jones Co. vs. Munger Co.* had been disposed of. The original appeal in Richmond vs. Atwood was disposed of in February; in the following September, Judge Aldrich, for the Court, delivered a learned opinion, declaring the construction of Section 7, and also the proper scope of the mandate.

52 Fed. 10, 2, C. C. A., 596.

The Court, after quoting Section 7, says, p. 20: "Of course in our endeavor to ascertain the meaning of this section of the statute, we must bear in mind that, prior to its enactment, an appeal from an interlocutory order was unknown in the Federal Courts. Having in view, therefore, this rule of law, and the plain language of the statute; considering also that the purpose of the lawmaker, plainly expressed, was to give the right of appeal not conferred by the general provisions of the statute as to appeals, from final decisions, it seems to us evident that it was intended to *remove the restrictions and extend the right to all that class of interlocutory orders or decrees which interfere with the possession of property, or operate in restraint of a party's business.*" The italics are mine.

Again on p. 22: "We think the term 'interlocutory order or decree' was used in its broadest sense, and that the purpose of Congress was to confer the right of appeal from any decree or order granting an injunction, at any stage of the proceeding, whether technically preliminary, interlocutory or final."

"As already said, we think the term was used in its

broadest sense, and, in our opinion, full scope should be given to this provision of the statute, to the end that any party aggrieved by any order or decree granting an injunction, at any stage of the proceedings, may have a speedy remedy by appeal. *It is plain that the policy intended to be emphasized by this statutory exception to the general provision of the statute and the rule of law, limiting the right of appeal to final decisions is this: that, as injunction orders deprive parties of the possession and control of property and business, and, in case of error, work irreparable mischief and great injustice, the party upon whom the order operates should have an early opportunity to have the record examined by the Appellate Court, and if error is discovered to have it corrected without the delay incident to litigation in its various stages before reaching final judgment.*" The italics are mine.

"As the statute in question undertakes to introduce a new feature in federal procedure, by conferring the right of appeal from certain orders and decrees before final decision, we have approached a consideration of its scope and effect with caution; and in view of the doubt which always comes from entering new fields, it is very gratifying to learn that the Circuit Court of Appeals for the Fifth Circuit has, in a similar case, adopted the same construction in a forcible opinion recently rendered by Pardee, Circuit Judge, in Jones Co. vs. Munger Co., reported 50 Fed. 785, I. C. C. A. 688."

In the case of *Columbus Watch Co. vs. Robbins*, 52 Fed. 337, 3, C. C. A., 216, which was also a patent case, the Circuit Court of Appeals for the Sixth Circuit declined to follow Richmond vs. Atwood and Jones vs. Munger, and decide the case on the merits, on an appeal from an interlocutory decree, and attempted to certify that question to

this Court, but the case was here dismissed on the ground that the question had really been decided by the Court of Appeals, and was not properly here.

S. C. 148, U. S. 266, 269.

Richmond vs. Atwood, on the rehearing, had not then been reported, as that case was not decided until September 27, 1892, and Columbus Watch Co. vs. Robbins was decided October 10th, 1892.

IN THE SEVENTH CIRCUIT.

Andrews vs. National Foundry & Pipe Works, 61 *Fed.* 782, 10 *C. C. A.* 60, was a creditors' bill filed by the National Foundry & Pipe Works against the Oconto Water Company, S. D. Andrews, W. H. Whitcomb and others. Andrews and Whitcomb were in possession of the property as purchasers under a foreclosure. An order was entered appointing a receiver for the property of the Water Company, requiring Andrews and Whitcomb to deliver the possession of the property to the receiver, and enjoining them from interfering with the possession of the receiver.

In answer to an objection to the jurisdiction of the Court, the Court, through Judge Woods, uses the following language, p. 789: "The objection is made that the statute authorizes an appeal only from an 'interlocutory order' of injunction, granted upon a hearing in equity; that the order in this case was a preliminary one, made upon the prima facie showing, and is not appealable; but we concur in the opinion of the Court of Appeals for the First Circuit, that the statute was intended to extend the right of appeal 'to all that class of interlocutory orders or decrees (of injunction) which interfere with the possession of property, or operate in the restraint of

trade.' Richmond vs. Atwood, 5 U. S. App. 151; 2 C. C. A. 596; 52 Fed. 10. The order granting an injunction should be set aside and it is so ordered."

There was an application for a rehearing. Mr. Justice Harlan sitting in the Court, and Judge Woods again delivering the opinion of the Court says, p. 790: "It is not necessary to consider whether or not under the statute an appeal may be had from an order appointing a receiver. On that question see Construction Co. vs. Young, 59 Fed. 721; 8 C. C. A. 231. Dudley E. Jones Co. vs. Munger Co., 2 U. S. App. 188; 1 C. C. A. 668; 50 Fed. 785. Richmond vs. Atwood, 2 C. C. A. 596; 52 Fed. 10. Pennsylvania Co. vs. Jacksonville R. R. Co., 55 Fed. 131; 5 C. C. A. 53. American Const. Co. vs. Penn. Co , 148 U. S. 372; 13 Sup. Ct. 758.

The appointment in this case was of a receiver of the Oconto Water Company, and of that the appellant cannot complain. The wrong done them was in ordering them to surrender to the receiver the possession of the Water Works plant, of which they were in possession, claiming title under the foreclosure sale, and directing the receiver to take possession thereof, and in enjoining them against asserting title or claim to the property. These features of the order are mandatory in character and subject to review upon appeal." The italics are mine.

IN THE FIFTH CIRCUIT.

In *Pennsylvania Co. vs. Jacksonville Railway Co.*, 55 Fed., 131, 5 C. C. A., 53, the appellant filed a bill for the foreclosure of a mortgage, the American Construction Company filed an intervening petition praying that the temporary order appointing a receiver should be set aside, and all fur-

ther proceedings in the suit be stayed, and on this petition an order was made as follows, p. 135: "This cause came on to be heard on the 28th day of July, 1892, on the motion of the American Construction Company, which had intervened therein, and which is also complainant in another suit in equity against the said defendant and others, in the bill filed on the 6th day of July, 1892, praying for the appointment of a receiver. The said motion and petition of intervention of the said American Construction Company prayed for an order vacating the order entered in the above entitled cause on the 23d day of the month of July, aforesaid, appointing Robert B Cable, Esq., receiver, and staying all further proceedings in said cause. On consideration thereof, and of the said several bills in equity, and the affidavits and exhibits in support thereof, it is ordered, adjudged and decreed that the aforesaid order appointing Robert B. Cable receiver of the property of the Jacksonville, Tampa & Key West Railway Company be and the same is hereby set aside and vacated, and all further proceedings in the above entitled cause stayed until the further order of this Court." The appeal was from this order.

Objection to the jurisdiction of the Court of Appeals was made and urged on a motion to dismiss. The Court, speaking through Judge McCormick, used the following language, p. 136: "In our opinion, to order, at the prayer of one party, that all further proceedings in the cause shall be stayed until the further order of the Court, is to grant an injunction, within the meaning of the seventh section of the act of March 3d, 1891. It follows that appellee's motion to dismiss this appeal must be denied."

The Court then proceeded to consider the petition on its

merits, and reversed it, reinstated the receiver and directed the property to be restored to his possession.

This case was brought to this Court on an application for a certiorari (American Construction Co. vs. Jacksonville Ry., 148 U. S., 385), where the jurisdiction was affirmed, this Court using the following language:

"In the first of the cases now before us the appeal was clearly well taken from the order of the Circuit Court, so far, at least, as the injunction was concerned. If the Circuit Court of Appeals, on the hearing of that appeal, erred in going beyond a modification of the injunction, and in setting aside so much of the orders appealed from as appointed a receiver and permitted him to issue receiver's notes, the error was one in the judicial determination of a case within the jurisdiction of that Court, and neither so important in its immediate effect, nor so far reaching in its consequences, as to warrant this Court in undertaking to control the cause at this stage of the proceedings."

IN THE SECOND CIRCUIT.

Florida Const. Co. vs. Young, 59 Fed., 721, 8 C. C. A., 231, was an appeal from an order appointing a receiver of appellant's property, and the order provided that the officers and agents of the Construction Company should forthwith deliver up to the receiver all of the property and books and papers of the company. The order also provided that the Construction Company, its officers and agents be enjoined and restrained from removing from the jurisdiction of the Court any of the property, books and papers of the Company, and from interfering in any way with the possession of the receiver.

The question of jurisdiction was not raised or considered. The Court, in an opinion by Judge Wallace, held that the Court of Appeals in a case of that character was limited to a consideration of the propriety of granting the injunction, and could not consider the question as to whether or not the receivers should have been appointed, on the ground that the injunction was merely subsidiary to the appointment of a receiver.

The opinion concludes as follows:

"Although it is auxiliary to the receivership, it is a remedy so merely formal in the present case, that it is difficult to conceive how it could have benefited the plaintiffs or injured the appellant. The order constituting the receivership, among other things, directed the officers and agents of the Construction Company to forthwith deliver to the receiver all of the property of the company in their possession; and, for a refusal to comply, they would be punishable by process of contempt as effectually as they could be under the injunction, if, in violation of its terms, they should remove the property beyond the jurisdiction of the Court. The appointment of a receiver is a remedy somewhat more stringent than an injunction, re-training a party whose property is subjected to a receivership from removing it from beyond the jurisdiction of the Court. R. R. Co. vs. Sloan, 31 Ohio St., 1. In the case of Skip vs. Harwood, 3 Atk., 564, where the defendant was present in court during the hearing on a bill for an accounting, and, in consequence, knew of the decision appointing a receiver, he was adjudged to be in contempt for removing a portion of the assets before the decree was drawn.

The injunction in the present case may have been un-

necessary, but it is hardly open to argument, that if the case presented to the Circuit Court justified the appointment of a receiver, it could not have been an improper exercise of discretion on the part of the Court to enjoin the officers and agents of the Construction Company from doing any acts which might tend to render the receivership ineffectual. The order should therefore be affirmed."

IN THE SIXTH CIRCUIT.

In *Bissell Company vs. Goshen Company*, 72 Fed., 545, 553, 554; 19 C. C. A., 25, Judge Lurton, delivering the opinion of the Court of Appeals for the Sixth Circuit, and speaking of the seventh section of the Act of 1891, uses the following language;

"This section and the amendment thereof, being intended to provide a remedy for an evil widely recognized, are entitled to a favorable construction, advancing the right as far as consistent with the words of the statute. Platt vs. R. R. Co., 99 U. S., 48; Heydenfeldt vs. Min. Co., 93, U. S., 638. The enlargement of the right of appeal so as to embrace the class of interlocutory decrees mentioned in the statute, was in accord with the well known usages and practice of English courts of equity in granting appeals from interlocutory decrees, and of such Chancery Courts in States of the Union as had not by statute limited appeals to those strictly final.

"The narrowness of the rule limiting appeals to technical final decrees, and the contrast with the well known English rule, was recognized by the Supreme Court in Forgay vs. Conrad, 6 How., 205, where the Court said:

"In limiting the right of appeal to final decrees, it was

obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. In this respect the practice of the United States Chancery Courts differs from the English practice, for appeals to the House of Lords may be taken from an interlocutory order of the Chancellor, which decides a right of property in dispute * * * and the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees."

"It is proper, therefore, to assume that when Congress undertook to enlarge the right of appeal, it did so in the full light of the history of appeals in equity causes, and with a full appreciation of the distinction between interlocutory orders or decrees and final decrees. What the Congress meant by an interlocutory decree, granting or continuing an injunction, is to be ascertained by interpreting the technical terms used in the Act according to their usual significance in courts proceeding according to the well known principles, rules and usages of courts of equity."

And then after pointing out the distinction between an interlocutory order and an interlocutory decree, he proceeds as follows:

"We may assume, that in using the language 'interlocutory order or decree,' Congress had regard to the distinction between an interlocutory order and an interlocutory decree, and intended by allowing an appeal from an interlocutory order, granting or continuing an injunction, to describe those preliminary orders granting an injunction upon a hearing on

affidavit, involving no determination of the merits, being allowed at the discretion of the Chancellor upon a balancing of inconveniences." P. 554.

IN THE SEVENTH CIRCUIT.

In *Lake Street Railroad vs. Farmers Loan and Trust Co.*, 77 Fed. 769, 23 C. C. A., 448, the suit had been begun in the State Court, and while there, an injunction had been granted, which, after removal, was dissolved, and from the order of dissolution, the appeal was taken. It was insisted that the question of jurisdiction was not open in the Court of Appeals, but that court was limited to a consideration of the order appealed from.

In a learned opinion by Judge Woods, the court construing section 7 of the act of 1891, and the amendatory acts of Feb. 18, 1895, denied this contention and thus referred to their own previous rulings and the decision in the second circuit, p. 791: "In Construction Company vs. Young, 11 U. S. App. 683, 8 C. C. A. 231, and 59 Fed. 721, there was no question of jurisdiction, and the expressions quoted and relied upon, are, perhaps, not in harmony with our decision in Andrews vs. Pipe Works, supra, wherein we held that so much of an order for the appointment of a receiver as directed the surrender of the property in controversy to the receiver was appealable."

IN THE FIRST CIRCUIT.

In *Lake Nat. Bank vs. Wolfeborough Sav. Bank*, 78 Fed. 517, 24 C. C. A. 195, the Court of Appeals speaking through Judge Colt, says: "This is an appeal from an interlocutory order appointing a receiver, and granting or continuing an

injunction. The appellees (complainants below) have filed a motion to dismiss the appeal upon the ground that this court has no jurisdiction. In support of this motion, it is urged that in the assignment of errors, the appellant raises only the question of the jurisdiction of the Circuit Court, and that under the act of March 3, 1891 (26 Stat. 826), this court cannot entertain an appeal which presents solely this question." * * * *" Again, on pages 518-519:

"*The appellees further urge in support of their motion to dismiss, that the injunction was merely incidental to the receivership order, and therefore not appealable under section seven. The interlocutory order or decree ordered the defendant, its officers and agents forthwith to deliver the property held by them into the hands of the receiver, and absolutely enjoined them to refrain from interfering with the property. While the injunction order was incidental to the appointment of a receiver, it was not merely nominal, but formed a substantial part of the decree. The question whether an interlocutory injunction was erroneously or improvidently granted, is appealable to this court.*" The italics are mine.

There being some diversity of opinion among the several Circuit Courts of Appeals as to what questions were open to the Appellate Court, on an appeal from an interlocutory order, the question was brought to this court at the last term, in *Smith vs. Vulcan Iron Works*, 165 U. S., 518, and this court in an opinion by Mr. Justice Gray says, page 525:

"The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in the courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which through-

out the progress of the cause, might seriously affect his interests but also to save both parties from the expense of further litigation should the appellate court be of opinion that the plaintiff was not entitled to an injunction, because his bill had no equity to support it."

In the opinion in Smith vs. Vulcan Iron Works, the case of Florida Construction Co. vs. Young, supra, is cited as sustaining the view that on an appeal from an order granting a preliminary injunction, the appellate court will consider the merits, but a careful consideration of that case will, I think, disclose the fact that the court there limited the rule to cases where the injunction is the main relief sought, and this last case was principally relied on in the Circuit Court of Appeals to sustain the contention of the appellee, but is not in harmony with the other cases I have cited, nor in my opinion, with the reasoning of this court in Smith vs. Vulcan Iron Works.

The question presented is one of vital importance to suitors and is entitled to the most serious consideration. The argument that was made which induced the courts to adopt the rule of construction which has been affirmed in Smith vs. Vulcan Iron Works, in patent cases, applies with even greater force to cases like the one at bar.

III.

Where the Order Appointing the Receiver is Accompanied by an Order Requiring the Surrender of Property or Restraining Interference with it, it has been Held Appealable.

1. While it may be conceded that it is no where expressly decided that an order appointing a receiver is of itself an injunction within the meaning of the section, the question here presented has been directly answered in the affirmative by the Circuit Court of Appeals for the Seventh Circuit in *Andrews vs. National Foundry & Pipe Works*, and by the Circuit Court of Appeals for the First Circuit in *Lake Nat. Bank vs. Wolfeborough Sav. Bank*, cited supra, where the order appointing the receiver, also required, as in this case, the surrender of the property.

2. The logic of the decisions seems to establish clearly that an order appointing a receiver is an injunction of itself, and there is a right of appeal.

The mischief to be remedied was two-fold, first, to give parties who had been summarily deprived of their property the right to have these orders promptly reviewed; and second, to secure the speedy determination of their causes on the merits. The first proposition was the foundation of the decision of the earliest case, *Dudley E. Jones Co. vs. Munger Co.*, supra, where the Circuit Court of Appeals in the forcible opinion delivered by Judge Pardee, first declared the purpose of Congress to give parties who had been *deprived of the possession of their property by an interlocutory order or decree the right to have the order reviewed.*

This construction was amplified by the Circuit Court of

Appeals for the First Circuit, in *Richmond vs. Atwood*, as was said by this Court in Smith vs. Vulcan Iron Works, "after thorough discussion of the subject on principle and authority."

Again, the Circuit Court of Appeals for the Fifth Circuit, in *Penn. Co. vs. Jacksonville Ry. Co.*, governed by the same controlling principle, held that an order staying a cause was an injunction within the meaning of the statute, and this ruling is expressly affirmed by this Court in Am. Const. Co. vs. Jacksonville Ry., though there is a query as to how far the Court of Appeals should have gone, which has since been settled by Smith vs. Vulcan Iron Works.

The Circuit Court of Appeals for the Seventh Circuit in *Andrews vs. National Foundry & Pipe Works*, affirming the cases previously cited, declares this paramount purpose of Congress, and sustained an appeal from an interlocutory order granting a subsidiary or ancillary injunction, and decided the case on its merits.

We are not left in doubt as to what the Court intended by this decision, for in the later case of *Lake Street R. R. vs. Farmer's Loan & Trust Company*, the same Court declares in an opinion by the same learned Judge, that in that case, they "*held that so much of an order for the appointment of a receiver as directed the surrender of the property in controversy to the receiver was appealable.*" The italics are mine.

The Circuit Court of Appeals for the Sixth Circuit, in the learned and exhaustive opinion by Judge Lurton, from which I have quoted, declares that this section and amendment are "entitled to a favorable construction advancing the right as far as may be consistent with the words of the statute." That learned Court, in terms approves the decisions in Jones vs. Munger, Richmond vs. Atwood, Penn. Co. vs.

Jacksonville Ry. and Andrews vs. National Foundry & Pipe Works.

The Circuit Court of Appeals for the First Circuit, in *Lake National Bank vs. Wolfeborough Sav. Bank* declared that an order which required the defendant and its officers to deliver the property to the receiver, and enjoined them from interfering with the property was appealable.

No case has been cited by opposing counsel which militates against these views, except Florida Construction Co. vs. Young.

The case of *Florida Construction Co. vs. Young* relied on by opposing counsel, while denying the right of an appeal from an order appointing a receiver, does not deny the right of appeal from an interlocutory order granting an injunction, even though it be subsidiary or auxiliary to the appointment of a receiver, and merely declares that the Court is limited to a consideration of the propriety of the injunction order.

This construction of the act of Congress seems to me to be clearly in conflict with the decisions of the several Circuit Courts of Appeal, and the decision of this Court in *Smith vs. Vulcan Iron Works*, as announced in the opinion delivered by Mr. Justice Gray, that it was not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which would be injurious to him, but to give him an opportunity to test the equity of the bill.

Guided by these rules and decisions, I respectfully assert the following propositions:

I.

Every order appointing a receiver which, like this, involves the taking of property from a party, necessarily implies, and is the equivalent of an injunction.

II.

An order, in connection with an order appointing a receiver, which requires the defendant to deliver property in his possession to the receiver is an injunction.

III.

If either of these propositions is sound, the order appealed from in this case was appealable under the provisions of Section 7, of the Act of March 3, 1891, as amended by the Act of February 18, 1895.

FIRST.

The statute authorizes an appeal "when upon a hearing in equity, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree." The words "upon a hearing in equity" have been held to cover a preliminary injunction. The words "order or decree," as I have shown, have been held to cover every and any order which grants or continues an injunction, or operates to restrain a party.

And the cases cited show that without exception, the Circuit Courts of Appeals hold, that where there is an order, which in terms restrains a party from interfering with the property over which a receiver is appointed, an appeal lies. Two of these courts have held that an appeal lies from the order if it requires the defendant to deliver the property to the receiver, and one has held, with the approval of this Court, that an order staying proceedings in a cause is an injunction. Did Congress intend that only orders which in terms restrain a *party* should be treated as orders granting injunctions, or was it intended that parties should have relief where the necessary effect of the order was to restrain.

If the necessary effect of an order is to restrain a party and subject him to penalties for contempt, is it any the less an injunction than it would be, if it restrained the party in terms? I submit it is the substance which must be considered, and the mischief which is to be remedied is the controlling influence. It can make no difference whether the order be called a restraining order, a stay of proceedings, or by any other name, if it operates to deprive parties of the possession and control of property and business, or compels enforced action in the use of property pending the litigation, or, if, in the words of Judge Aldrich, it belongs "to that class of interlocutory orders or decrees which interfere with the possession of property or operate in the restraint of a party's business * * * the party upon whom the order operates should have an early opportunity to have the record examined by the appellate court."

The mischief was, that by interlocutory orders of the court, the parties were deprived of the use, control, and possession of their property indefinitely, and the purpose was to afford the injured party a speedy remedy.

A majority of the cases cited were patent cases, but the reasons which induced the courts to construe the statute, in cases of that class, will apply with even greater force to cases of the character of the one at bar. In the patent case, the party is only prevented by the "interlocutory order or decree" from using his property pending the appeal; while in the case at bar, the defendant, by an interlocutory order, is absolutely deprived of the possession and control of its property, and the liberal construction given to the statute is to be reversed, and this order, which has all the characteristics of an injunction, both in its scope and effect, and which is mani-

festly within the mischief intended to be remedied by the statute, is to be held not to be an injunction within its terms, because, it is said, it is not the main relief sought by the bill.

The numerous illustrations of the hardships which arose by reason of injunctions in patent cases could be more than duplicated in cases of receiverships with incidental, or subsidiary, or implied injunctions, whether mandatory or prohibitory in their character. The case at bar seems to be a sufficiently glaring illustration, and I shall content myself with a reference to two recent cases.

Shields vs. Coleman, 157 U. S. 168.

Clark vs. Central R. R. of Georgia, 50 Fed. 338.

In the former case, as is well known, a receivership was vacated after the entire property had been sold and the receiver discharged, and in the latter, a great railroad system was practically destroyed by an *ex parte* appointment of a receiver.

If the construction of Section 7, as I submit is declared in the cases cited is sound, then the word "injunction" will be construed to cover every interlocutory order depriving a party of the possession or control of his property, "for such a construction is required to render the remedy effectual. For we must always construe an act so as to suppress the mischief and advance the remedy." Lyde vs. Barnard, supra.

If the intention of the law maker is to be ascertained by the rules of construction affirmed and declared by the authorities, and by none more forcibly than this learned tribunal, the question might be submitted on principle with confidence. But in view of the decisions of several of the Circuit Courts of Appeals, with but one discordant note, and the latest declara-

tion of this court, it seems to me that the affimative answer to the question certified is fully warranted by authority.

In Evans vs. Coventry, 3 Drew., 82, the learned Vice Chancellor says: "Having prayed * * that a receiver shall be appointed until a winding up shall take place, the sixth paragraph of the prayer is for an injunction to restrain the defendants from getting in any of the assets of the concern. That is connected in fact with the appointment of a receiver and I may observe with respect to that, that of course the appointment of a receiver (if a receiver were appointed) would of itself operate as an injunction; and it would not be necessary, if a receiver were appointed to go and grant an injunction in terms."

The learned court in *Florida Construction Co. vs. Young*, supra, have, while denying the right of appeal fro n an order appointing a receiver, in effect declared such an order to be the equivalent of an injunction. "The appointment of a receiver is a remedy somewhat more stringent than and injunction restraining the party whose property is subject to a receivership from removing it beyond the jurisdiction of the court. Railroad Co. vs. Sloan, 31 Ohio St. 1." The court then refers to Skip vs. Harwood, 3 Atk. 564, were a party who was present and knew of the decision appointing a receiver, removed a part of the assets before the decree was drawn, and was held guilty of contempt.

Can it be true that the greater the mischief, the more injurious it is to the defendant, the less his remedy is? That because the order does not say in terms that it is an injunction, or does not in terms restrain the defendant, that it may have all, and even more, force and effect than an injunction

so far as it may affect the defendant injuriously, and yet he be deprived of his appeal?

On what principle could the party in Skip vs. Harwood be punished for a contempt, except, on the ground of an implied injunction in the order?

A court may by an order restrain a party from interering with property, and punish him for contempt for a violation of the order, and this is an injunction, but if the party is by the order of the court required to surrender his property to an officer named by the court and is punishable for contempt for his failure to comply, this is not an injunction. This is the proposition which the appellee must sustain to defeat the right of appeal.

Viewed in the light of its effect upon the defendant corporation, the order in the case at bar is the most sweeping character of injunction.

It suspends the right of action by the corporation.

In Thompson on Corporations the learned author says: "The necessary effect of the appointment of a receiver, unless the statute under which he is appointed is restrictive, is to suspend all rights of action, of whatever description, on the part of the corporation, since the receiver, in a general receivership, whether it be what is called a receivership *pendente lite*, or a receivership for the purpose of winding up the corporation, is vested with the right to the custody of all the assets of the corporation of whatever description, for the purposes of the administration; and this necessarily includes every right of action of whatever description, which is possessed by the corporation."

5 Thompson on Corp., §6900.

It is elementary that the appointment of a receiver of a

court of competent jurisdiction and taking possession operates as an injunction, not only on the parties to the action, but upon all parties and courts, and no one can interfere with the subject of the receivership.

5 Thompson on Corp., §6898.

Mr High, in his work on Receivers, says (High on Receivers, §15-16):

"The relief granted by courts of equity in the appointment of receivers *pendente lite* bears in many respects a close analogy to that by preliminary injunction. Some points of resemblance in the two forms of remedy have been already indicated, while others will frequently appear throughout the following pages. Both are extraordinary equitable remedies, as distinguished from the usual and ordinary modes of administering relief either in courts of law or of equity. Both are essentially preventive in their nature, being properly used only for the prevention of future injury, rather than for the redress of past grievances. Both, too, have one common object in so far as they seek to preserve the *res* or subject matter of the litigation unimpaired, to be disposed of in accordance with the future decree or order of the court. Perhaps the principal element of difference between these two important remedies lies in this: that an injunction is strictly a conservative remedy, merely restraining action, and preserving matters in *statu quo*, without affecting the possession of the property or fund in controversy; while the appointment of a receiver is usually a more active remedy, since it changes the possession as well as the subsequent control and management of the property. A court of equity by an injunction ties up the hands of the defendants, and preserves unchanged, not only the property itself, but the relation of

all parties thereto. But in appointing a receiver, the court goes still further, since it wrests the possession from the defendant, and assumes and maintains the entire management and control of the property or fund, frequently changing its form, and retaining possession through its officer, the receiver, until the rights of all parties in interest are satisfactorily determined."

"§16. From points of resemblance already indicated between these two extraordinary equitable remedies, it is not to be inferred that the appointment of a receiver necessarily follows from the granting of an injunction, or that the two remedies are necessarily inseparable. And while it frequently happens that courts are called upon to administer both species of relief in the same action at one and the same time, yet it by no means follows that because an injunction is granted a receiver must be appointed, and the two are to be treated as distinct and independent matters. A court of equity may therefore refuse a receiver, although the case presented is a fitting one for an injunction, and although an injunction has already been granted. It has been held, however, that the power of appointing a receiver, when the relief is necessary for the collection and preservation of property, pending an injunction suit, is a necessary incident to the power of granting an injunction; and if the latter power be expressly conferred by law upon a judge in vacation, the former may be regarded as conferred by implication."

SECOND.

The order made by the Circuit Court contains an injunction when tested by any fair rule of construction.

I quote from the order: "And the said Highland

and Belt Railroad Company and each and every of its officers, directors, agents and employes are hereby required and commanded forthwith to turn over and deliver to such receiver, or his duly constituted representative, any and all notes, accounts, money or other property in his or their hands, or under his or their control."

Record p. 22.

It is an order to the defendants to do a particular act, which comes within the definition of the lexicographers.

Century Dictionary, Injunction.

And this accords with the definition of the text writers.

"A writ of injunction may be defined as a judicial process operating *in personam*, and requiring the person to whom it is directed, to do, or refrain from doing a particular thing."

1 High on Injunction, §1.

Judge Story defines it as "A judicial process whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ.

2 Story Eq. Jur. §871.

It is an injunction under the rule laid down in *Richmond vs. Atwood;* it is declared in terms to be an injunction in *Andrews vs. National Foundry and Pipe Works*, and in *Lake National Bank vs. Wolfeborough Savings Bank.*

Surely it may be urged with great force in the construction of a remedial statute, that these learned courts having understood and construed this word according to its general acceptation, that this was what the law makers intended.

No authority has been cited controverting this construction and definition, except *Florida Construction Company vs. Young*, to which I have heretofore directed the attention of the court.

THIRD.

If I have succeeded in convincing your Honors on either of the two propositions, then I respectfully submit that I have established the third, and the question submitted by the learned Circuit Court of Appeals must be answered in the affirmative.

Respectfully submitted,

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